EXHIBIT 1
DATE 2-1-07
HB ~~Education~~ Committee Bill

Right to Know, Right to Privacy
and Montana's Criminal Justice Information Act:
A Discussion of Law Enforcement Records

Right to Know and Right to Privacy

Article II, section 9 of the Montana Constitution provides that:
No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Article II, section 10 provides that:
The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

The framers of the Montana Constitution contemplated inevitable tension between these two important rights. The Bill of Rights Committee Comments state:

> "The committee intends by this provision that the right to know not be absolute. The right of the individual privacy is to be fully respected in any statutory embellishment of the provision as well as court decisions that will interpret it. To the extent that a violation of individual privacy outweighs the public right to know, the right to know does not apply."

Montana Criminal Justice Information Act
(MCA 44-5-101 to –311)

The Legislature considered these competing constitutional rights, as well as the comments and suggestions of Montana press representatives, in drafting and enacting the Criminal Justice Information Act of 1979. When the Act was passed, following extensive amendment in committee, it contained this statement of purpose:

> "The purpose of this chapter is to require the photographing and fingerprinting of persons under certain circumstances, to ensure the accuracy and completeness of criminal history information, and to establish effective protection of individual privacy in confidential and nonconfidential criminal justice information collection, storage and dissemination."

The Act's purpose of protecting individual privacy is seen in the division of all criminal justice information into two categories:

- **Public** criminal justice information, which is specifically enumerated and available for public dissemination, and
- **Confidential** criminal justice information, which in addition to being enumerated, is also defined as "any other criminal justice information not clearly defined as public criminal justice information." Confidential criminal justice information may not be publicly disseminated.

Public Criminal Justice Information

- Made public by law
- Court records and proceedings
- Convictions, deferred sentences, and deferred prosecutions
- Post-conviction proceedings and status
- Information originated by a criminal justice agency, including
    - Initial offense reports
    - Initial arrest records
    - Bail records
    - Daily jail occupancy rosters
- Information considered necessary by a criminal justice agency to secure public assistance in the apprehension of a suspect
- Statistical information (data derived from records in which individuals are not identified or identification is deleted)

Confidential Criminal Justice Information

- Criminal investigative information: Information associated with an individual, group, organization, or event compiled by a criminal justice agency in the course of conducting an investigation of a crime or crimes.
- Criminal intelligence information: Information associated with an identifiable individual, group, organization, or event compiled by a criminal justice agency in the course of conducting an investigation relating to a major criminal conspiracy, projecting potential criminal operation, or producing an estimate of future major criminal activities, or, in relation to the reliability of information, including information derived from reports of informants or investigators or from any type of surveillance. It does not include information relating to political surveillance or criminal investigative information.
- Fingerprints and photographs
- Criminal justice information or records made confidential by law
- Any other criminal justice information not clearly defined as public criminal justice information.

Dissemination of Criminal Justice Information
Public criminal justice information

- No restrictions on dissemination
- Available from the department or agency that is the source of the original documents and authorized to maintain the documents
- These documents must be open, subject to the restrictions in this section, during the agency's normal business hours
- A reasonable charge may be made by the agency for providing copies

Criminal History Record Information

Some criminal history record information is not public. Nonetheless, it may be disseminated with the consent or at the request of the individual about whom it relates according to procedures in 44-5-214 and 44-5-215:

- Requestor must provide "satisfactory identification"
- May be requested during normal working hours
- A charge may be made for the cost of copies, and each copy must be clearly marked to indicate it is for inspection only
- A record of each request to inspect records under this section must be maintained

Disseminated if a district court orders dissemination

Disseminated in compliance with 44-5-304:

- Pursuant to agreement with agency
- To develop statistical information

The agency receiving the information is authorized by law to receive it

Confidential criminal justice information may be disseminated to:

- Criminal justice agencies
- A fire service agency or fire marshal concerning the investigation of a fire
- The county attorney or his/her designee for local fetal, infant, and child mortality teams
- Those authorized by law to receive it
- Those authorized to receive it by a district court upon a written finding that the demands of individual privacy to do not clearly exceed the merits of public disclosure.
- To a victim, if the prosecutor determines that dissemination will not jeopardize a pending investigation or other criminal proceeding.

Procedure for Release of Confidential Information

A procedure exists for the release of confidential criminal justice information relating to an investigation that has been terminated, either by declination of prosecution or judgment, dismissal, or acquittal. If the prosecutor receives written request for release:

- He or she may file declaratory judgment action (MCA 44-5-303)
- Court conducts *in camera* review and makes written finding weighing the demands of individual privacy against the merits of public disclosure
- Court may order release upon payment of reasonable reproduction costs. The parties bear their respective costs and attorney fees
- Not an exclusive remedy. A person or organization may file any action for dissemination of information that is appropriate

Issues

Offense reports and arrest records
As noted above, initial offense reports and initial arrest records are public criminal justice information. However, such reports often contain information that falls squarely within the definition of criminal investigative information, raising a question concerning the legality of publicly disseminating that information. A number of cases and attorney general's opinions have addressed the question. Currently, the Department of Justice has rules pending defining the term initial offense report. These pending rules are attached as Ex. A.

In determining whether criminal investigative information contained in an initial offense report or an initial arrest record should be publicly disseminated, the custodian of the criminal justice information must balance the interests of the public's right to know and an individual's right of privacy on a case-by-case basis.

Individuals retain a subjective expectation of privacy of address, telephone number, Social Security number and date of birth. Society is prepared to recognize that interest as reasonable. Given the potential misuse of such information, the demands of individual privacy clearly exceed the merits of public disclosure.

Recordings of phone calls reporting offenses and dispatch recordings should be considered public criminal justice information if they fall within the definition of public criminal justice information. Exceptions would be if those recordings contain information defined as confidential. If so, deletion of that information may be required prior to public dissemination.

Victims and Nondisclosure
If a victim requests confidentiality, an agency may not disseminate – except to another criminal justice agency – the address, telephone number, or place of employment of the victim or a member of the victim's family. Similarly, an agency may not disseminate to the public any information directly or indirectly identifying a victim of sexual assault, sexual intercourse without consent, indecent exposure, or incest.

Exceptions to this confidentiality include the location of the crime scene or if the disclosure is required by law, is necessary for law enforcement purposes, or is authorized by a district court.

See 50 Op. Att'y Gen. 6 (2004).

Witnesses
Witnesses and other people who are involved in a case by virtue of their employment retain a privacy interest in not having their identities published, and society is prepared to recognize that as reasonable. Clearly the publication of names and addresses of witnesses would have a chilling effect on the willingness of people to come forward with information in cases.

Medical Information
The Court has carefully guarded against public scrutiny of "very private and personal matters."

Under federal law (HIPPA) and state law, medical records are highly private. A privacy interest in medical information is not waived by virtue of the fact that one is a public official.

Balancing the Right to Privacy and the Right to Know

Ultimately, the custodian of the criminal justice information must decide on a case-by-case basis whether that information will be publicly disseminated. Montana Supreme Court decisions concerning the conflict between the public's right to know and an individual's right of privacy suggest a three-part analytical framework for making that decision:

- Is a right of individual privacy protected by the Montana Constitution?
- Does that right clearly exceed the public's right to know under the Montana Constitution?
- Is denial of public access required to protect the individual privacy right?

Is a right of individual privacy protected by the Montana Constitution?
The Supreme Court has held that a constitutional right to privacy exists when a person has an actual or subjective expectation of privacy which society is prepared to recognize as reasonable.

In the case of "initial offense reports" and "initial arrest records," it is clear that situations may arise involving an expectation of privacy by the individuals involved. Victims and families of victims of certain crimes may well have such an expectation; informants, complainants, and witnesses may also entertain an actual expectation of privacy, and suspects may have such an expectation in certain instances, because the vagaries of criminal investigation occasionally result in the designation of the innocent as suspects.

Upon determining that a subjective expectation of privacy exists, the Montana Supreme Court has focused closely on the nature of the information sought in determining whether society is willing to recognize an individual's privacy interest is reasonable. Family problems, health problems, drug and alcohol problems, and interpersonal relations have all been acknowledged by the Court as entailing the kind of sensitive and personal information which society recognizes as involving a reasonable privacy interest.

The Court has also registered concern with the potential inaccuracy of information sought, and the damage to reputation caused by public disclosure of inaccurate information, in evaluating the reasonableness of an individual's expectation of privacy.

Finally, the Court has cited the advancement of some goals – like frank and candid evaluations of state university presidents – in recognizing that certain privacy interests are reasonable.

Does that right clearly exceed the public's right to know under the Montana Constitution?
If a privacy interest has been found to exist, it must be determined whether that interest clearly exceeds the public's right to know under Article II, section 9 of the Montana Constitution. The Court has found this requires balancing "the competing rights in the context of the purposes, functions, and needs of the governmental entity involved and the purposes and merits of the asserted public right to know."

Is denial of public access required to protect the individual privacy right?
Because the judiciary has the authority over the interpretation of the Constitution, it is the Supreme Court's duty to balance the competing rights at issue in order to determine what, if any, information should be disseminated.
The Supreme Court has held that the district court should conduct an *in camera* inspection of the documents or information sought. Only then can the Court properly balance the rights of the respectively parties and protect both rights to the greatest extent possible.

Conclusion

As a general rule, initial offense reports and initial arrest records must be made publicly available. Occasions may arise, however, when these documents involve a privacy interest that clearly exceeds the public's right to know. This is particularly true in those instances where protecting a meritorious privacy right also advances the general goals of criminal justice agencies in gathering information about and successfully prosecuting crime.

It is impossible to provide a hard and fast rule for balancing these competing rights that would be applicable to all the situations that give rise to initial offense reports and initial arrest records.

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RIGHT TO KNOW, RIGHT TO PRIVACY AND MONTANA'S CRIMINAL JUSTICE INFORMATION ACT AS IT PERTAINS TO LAW ENFORCEMENT RECORDS DISSEMINATION: A DISCUSSION

PURPOSE: To establish a consistent and legal manner for the dissemination of records in the custody of law enforcement records divisions. Refer to Mont. Code Ann. §§ 44-5-301 to -311, 61-7-114 and 53-21-166.

I. RIGHT TO KNOW AND RIGHT TO PRIVACY

A. Constitutional and Legislative History

1. Article II, section 9 of the Montana Constitution provides that:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

2. Article II, section 10 provides that:

> The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

B. Discussion

It is clear that the framers of the Montana Constitution contemplated the inevitable tension between these two important rights. See VII Mont. Const. Conv. 2483-98 (1972). (Discussion regarding striking the Right to Know or adding language "except when individual privacy clearly outweighs the public's right to know".) The plain and explicit language of Article II, section 9 makes it equally clear that the framers contemplated that occasions may arise in modern technological society where the public's right to know must be subservient to the "demand of individual privacy." See V Mont. Const. Conv. 1680-81 (1972), II Mont. Const. Conv. 632 (1972). Regarding the privacy exception to the right know section of the 1972 Constitution, the Bill of Rights Committee Comments state:

> The committee intends by this provision that the right to know not be absolute. The right of the individual privacy is to be fully respected in any

statutory embellishment of the provision as well as court decisions that will interpret it. To the extent that a violation of individual privacy outweighs the public right to know, the right to know does not apply.

II. MONTANA CRIMINAL JUSTICE INFORMATION ACT MONT. CODE ANN. §§ 44-5-101 TO -311

The Legislature considered these competing constitutional rights, as well as the comments and suggestions of Montana press representatives, in drafting and enacting the Criminal Justice Information Act of 1979. See Minutes of Senate Judiciary Committee, February 7, 1979; Minutes of House Judiciary Committee, March 13, 1979.

When the Act was passed following extensive amendment in committee it contained the following statement of purpose:

> The purpose of this chapter is to require the photographing and fingerprinting of persons under certain circumstances, to ensure the accuracy and completeness of criminal history information, and to establish effective protection of individual privacy in confidential and nonconfidential criminal justice information collection, storage and dissemination.

The Act's purpose of protecting individual privacy is manifested by the division of all criminal justice information into two categories, "public criminal justice information," which is specifically enumerated and publicly disseminable, and "confidential criminal justice information," which in addition to being enumerated, is also defined as "any other criminal justice information not clearly defined as public criminal justice information." Mont. Code Ann. § 44-5-103(3), (12). Confidential criminal justice information is not publicly disseminable. Mont. Code Ann. § 44-5-303.

Until recently, the act contained no process by which confidential criminal justice information, such as investigative reports relating to a crime, were to be released to the public and the media. A procedure for turning over such information in completed cases was added to the statute in 2003. Mont. Code Ann. § 44-5-303(5). There is nothing in the act concerning the length of time criminal justice information is considered confidential. Presumably it is indefinite.

A. Public Criminal Justice Information

1. Made public by law

2. Court records and proceedings

3. Convictions, deferred sentences, and deferred prosecutions

4. Postconviction proceedings and status

5. Information originated by a criminal justice agency, including

   a. Initial offense reports
   b. Initial arrest records
   c. Bail records
   d. Daily jail occupancy rosters

6. Information considered necessary by a criminal justice agency to secure public assistance in the apprehension of a suspect

7. Statistical information (data derived from records in which individuals are not identified or identification is deleted)

B. Discussion

The Act however, does not define the phrases "initial offense report" and "initial arrest record". Furthermore, it is my understanding that the various criminal justice agencies in Montana do not use standardized forms employing those phrases. Therefore, ordinary principles of statutory construction must be applied to determine the proper interpretation of those terms. The fundamental rule of statutory construction is that the intention of the Legislature controls, and that requires initial reference to the plain language of the statute. 42 Op. Att'y Gen. 119 (1988). (numerous cites).

Under this section, an initial offense report is the first record of a criminal justice agency that indicates that a criminal offense may have been committed, including the initial facts associated with that offense. 42 Op. Att'y Gen. 119 (1988)

An initial arrest record is the first record made by a criminal justice agency indicating the fact of a particular person's arrest, including the initial facts associated with that arrest. If an initial offense report or initial arrest record contains information defined as confidential by the Act, that information may have to be deleted prior to public dissemination. 42 Op. Att'y Gen. 119 (1988)

1. In Engrav v. Cragun, 236 Mont. 260, 769 P.2d 1224 (1989), the Supreme Court held that the District Court properly refused the request of a student who sought Sheriff's department information for a school project. Information requested included: (1) records of the daily log of phone calls; (2) case files of criminal investigations; (3) preemployment investigation reports; and (4) lists of arrested persons. Persons involved had an actual expectation of privacy, and the interests of society were furthered by recognition of the privacy interest as reasonable. The student had the right to view and record statistical information pursuant to Mont. Code Ann. § 44-5-103, but the requested information was protected by the Montana Constitution and the Montana Criminal Justice Information Act of 1979 and was beyond the reach of the public sector. Followed in Bozeman Daily Chronicle v. City of Bozeman Police Dep't., 260 Mont. 218, 859 P.2d 435 (1993).

2. As the Department of Justice has rule making authority under the Act, the Department has proposed rules to define initial offense report. The proposed rules are attached as Ex. A.

C. Confidential Criminal Justice Information

1. Criminal investigative information: Information associated with an individual, group, organization, or event compiled by a criminal justice agency in the course of conducting an investigation of a crime or crimes.

2. Criminal intelligence information: Information associated with an identifiable individual, group, organization, or event complied by a criminal justice agency in the course of conducting an investigation relating to a major criminal conspiracy, projecting potential criminal operation, or producing an estimate of future major criminal activities, or, in relation to the reliability of information, including information derived from reports of informants or investigators or from any type of surveillance. It does not include information relating to political surveillance or criminal investigative information.

3. Fingerprints and photographs

4. Criminal justice information or records made confidential by law

5. Any other criminal justice information not clearly defined as public criminal justice information

D. Dissemination of Criminal Justice Information

Public criminal justice information

1. No restrictions on dissemination

2. Available from the department or agency that is the source of the original documents and authorized to maintain the documents

3. These documents must be open, subject to the restrictions in this section, during the agency's normal business hours

4. A reasonable charge may be made by the agency for providing copies

E. Discussion: "Private" v. "Public" Information

The crux of the issue presented to you all is that "initial offense reports" and "initial arrest records" frequently contain information that falls squarely within the definition of criminal investigative information, raising a question concerning the legality of publicly disseminating that information.

The interests of the public's right to know and an individual's right of privacy must be balanced on a case-by-case basis by the custodian of the criminal justice information sought in determining whether criminal investigative information contained in an initial offense report or an initial arrest record should be publicly disseminated. 42 Op. Att'y Gen. 119 (1988)

1. Address, Telephone Number, SSN, DOB:

Individuals retain a subjective expectation of privacy in these items and society is prepared to recognize that interest as reasonable. Given the potential for misuse of such information, the demands of individual privacy clearly exceed the merits of public disclosure. Jefferson county case.

Recordings of phone calls reporting offenses and dispatch recordings should be considered public criminal justice information if they fall within the definition of public criminal justice information, except that if those

recordings contain information defined as confidential, deletion of that information may be required prior to public dissemination. 42 Op. Att'y Gen. 119 (1988).

2. Names, Addresses, Telephone Numbers of Witnesses: Like Attending EMTs, Doctors and Nurses

Witnesses and other people who are involved in a case by virtue of their employment retain a privacy interest in not having their identities published and society is prepared to recognize that as reasonable. Clearly the publication of names and addresses of witnesses would have a chilling effect on the willingness of people to come forward with information in cases. In the Bozeman Daily Chronicle, the name of an off-duty law enforcement officer who was accused of sexual intercourse without consent by a cadet at the Law Enforcement Academy was released, but the Court ordered that special pains be taken to protect the privacy rights of the victim and witnesses. It also ordered that the District Court determine if privacy rights of other persons involved in the case merit protection and, if so, that the Court protect their privacy rights.

3. E-mail Addresses and Passwords

4. Medical Information

a. The Court has carefully guarded against public scrutiny of "very private and personal matters." Citizens to Recall Mayor James Whitlock v. Whitlock, 255 Mont. 517, 844 P.2d 74 (1992).

b. Under federal law (HIPPA) and state law, medical records are highly private. A privacy interest in medical information is not waived by virtue of the fact that one is a public official.

F. Nondisclosure of Information About Victims

1. If a victim requests confidentiality, an agency may not disseminate, except to another criminal justice agency, the address, telephone number, or place of employment of the victim or a member of the victim's family unless disclosure is of the location of the crime scene, is required by law, is necessary for law enforcement purposes, or is authorized by a district court. Mont. Code Ann. § 44-5-311(1) (training/ victims rights forms/discretion)

2. An agency may not disseminate to the public any information directly or indirectly identifying a victim of sexual assault, sexual intercourse without consent, indecent exposure, or incest, unless disclosure is of the location of the crime scene, is required by law, is necessary for law enforcement purposes, or is authorized by a district court upon a showing of good cause. Mont. Code Ann. § 44-5-312(3).

3. The Montana Supreme Court has repeatedly stated that victims of sex crimes have a legitimate expectation of privacy. Allstate v. City of Billings, 239 Mont. 321, 324, 780 P.2d 186, 188; Bozeman Daily Chronicle, 260 Mont. at 228, 859 P.2d at 441.

4. On April 1, 2004, the Attorney General issued an opinion on this portion of the statute holding:

1. When a crime victim requests confidentiality, the public dissemination of certain information, including the address, telephone number, or place of employment of the victim or a member of the victim's family is prohibited, unless an exception listed in Mont. Code Ann. § 44-5-311(1) applies.

2. Information directly or indirectly disclosing the identity of victims of certain sex crimes may not be publicly disseminated unless an exception listed in Mont. Code Ann. § 44-5-311(1) applies.

3. A law enforcement agency may disclose a crime scene location under Mont. Code Ann. § 44-5-311(1), (3), even if such disclosure may suggest the identity of the victim.

50 Op. Att'y Gen. No. 6 (2004).

G. Criminal History Record Information That is Not Public

1. Disseminated with the consent or at the request of the individual about whom it relates according to procedures in Mont. Code Ann. §§ 44-5-214 and -215:

a. Individual must provide "satisfactory identification"
b. May be requested during normal working hours
c. A charge may be made for the cost of copies, and each copy must be clearly marked to indicate it is for inspection only

d. A record of each request to inspect records under this section must be maintained

2. Disseminated if a district court orders dissemination

3. Disseminated in compliance with Mont. Code Ann. § 44-56-304:

a. Pursuant to agreement with agency
b. To develop statistical information

4. The agency receiving the information is authorized by law to receive it

H. Confidential Criminal Justice Information may be Disseminated to:

1. Criminal justice agencies

2. A fire service agency or fire marshal concerning the investigation of a fire

3. The county attorney or his/her designee for local fetal, infant, and child mortality teams

4. Those authorized by law to receive it

5. Those authorized to receive it by a district court upon a written finding that the demands of individual privacy to do not clearly exceed the merits of public disclosure.

6. To a victim, if the prosecutor determines that dissemination will not jeopardize a pending investigation or other criminal proceeding (dissemination is by prosecutor or investigating agency after consulting with prosecutor)

I. Procedure for Release of Confidential Criminal Justice Information Relating to Investigation That has Been Terminated by Declination of Prosecution or Relating to a Criminal Prosecution That has Been Completed by Entry of Judgment, Dismissal, or Acquittal

1. If prosecutor receives written request for release

2. The Prosecutor may file declaratory judgment action (Mont. Code Ann. § 44-5-303)

3. Court conducts *in camera* review and makes written finding weighing the demands of individual privacy against the merits of public disclosure

4. Court may order release upon payment of reasonable reproduction costs

5. The parties bear their respective costs and attorney fees

6. Not an exclusive remedy. A person or organization may file any action for dissemination of information that is appropriate

7. Another remedy. In 1998, the Lincoln County Board of County Commissioners requested an evidentiary hearing, seeking the release of criminal justice system information related to an investigation of the Commission by the state. The state Criminal Investigation Bureau contended that the investigative file contained confidential information, the release of which would compromise both the investigation and the privacy interests of informants and witnesses. The District Court canceled the hearing, denied the request for dissemination of the investigative materials, and dismissed the complaint with prejudice. On appeal, the Supreme Court reversed, noting that an analysis of potentially competing privacy interests of the parties was necessary in order to balance those interests against the Commission's right to know. On remand, the District Court was instructed to conduct an in camera inspection of the investigative file in order to determine what material could be released to the Commission while maintaining the privacy of witnesses and informants and was instructed to limit the release of any investigative information by protective order. Lincoln County Comm'n v. Nixon, 1998 MT 298, 292 Mont. 42, 968 P.2d 1141.

III. BALANCING THE RIGHT TO PRIVACY AND THE RIGHT TO KNOW.

The custodian of the criminal justice information sought must ultimately decide on a case-by-case basis whether that information will be publicly disseminated. See 37 Op. Att'y Gen. No. 112 , 485 (1978). Montana Supreme Court decisions concerning the conflict between the public's right to know and an individual's right of privacy suggest a useful analytical framework for making that decision.

THREE–PART ANALYSIS:

A. Whether There is a Right of Individual Privacy Protected by the Montana Constitution

Discussion: The Supreme Court has held that a constitutional right to privacy exists when a person has an actual or subjective expectation of privacy which society is prepared to recognize as reasonable. Montana Human Rights Div. v. Billings, 199 Mont. 434, 440-41, 649 P.2d 1283, 1287 (1982).

In the case of "initial offense reports" and "initial arrest records," it is clear that situations may arise involving an expectation of privacy by the individuals

involved. Victims and families of victims of certain crimes, particularly sex crimes and criminal offenses affecting domestic relations, may well have such an expectation. Informants, complainants, and witnesses may also entertain an actual expectation of privacy. Suspects may have such an expectation in certain instances, because the vagaries of criminal investigation occasionally result in the designation of the innocent as suspects, particularly in the "early and unsubstantiated stages" of investigation. 42 Op. Att'y Gen. 119 (1988).

Upon determining that a subjective expectation of privacy exists, the Montana Supreme Court has focused closely on the nature of the information sought in determining whether society is willing to recognize an individual's privacy interest is reasonable. Missoulian v. Board of Regents, 207 Mont. 513, 675 P.2d 962 (1984); Montana Human Rights Div., 199 Mont. at 442, 649 P.2d at 1287. Family problems, health problems, drug and alcohol problems, and interpersonal relations have all been acknowledged by the Court as entailing the kind of sensitive and personal information which society recognizes as involving a reasonable privacy interest. Missoulian, 207 Mont. at 524, 675 P.2d at 968, and Montana Human Rights Div., 199 Mont. at 442, 649 P.2d at 1287.

The Court has also registered concern with the potential inaccuracy of information sought, and the damage to reputation caused by public disclosure of inaccurate information, in evaluating the reasonableness of an individual's expectation of privacy. Belth v. Bennett, 227 Mont 341, 348, 740 P.2d 638, 642-43. Finally, the Court has cited the advancement of socially desirous goals, such as frank and candid evaluations of state university presidents, in recognizing that certain privacy interests are reasonable. Missoulian., 207 Mont. at 526, 675 P.2d at 969.

B. Whether That Right Clearly Exceeds the Public's Right to Know Under the Montana Constitution

Discussion: If a privacy interest has been found to exist, it must be determined whether that interest clearly exceeds the public's right to know under Article II, section 9 of the Montana Constitution. This requires balancing "the competing rights in the context of the purposes, functions, and needs of the governmental entity involved and the purposes and merits of the asserted public right to know." Missoulian, 207 Mont. at 531, 675 P.2d at 971-72.

Any attempt to balance these rights must begin with recognition of the public's long-standing right to know about the existence of crime within the community, and about the treatment of a particular crime by the criminal justice agencies involved. Disclosure alerts the public that a particular crime has occurred and serves to warn the community about any danger involved. Law enforcement officials may always make public information which they deem necessary "to secure public assistance in the apprehension of a suspect." Mont. Code Ann. § 44-5-103(12)(f). An alerted and cooperative public can provide law enforcement officials with valuable investigative information, as well as witnesses and physical evidence. Disclosure generally serves to "open" public agencies, providing the people with the means to evaluate agency performance, and that of elected officials. Disclosure also educates the community about the operation of an important public institution, the criminal justice system, and can thus serve the laudable function of fostering public trust in that institution. 42 Op. Att'y Gen. 119 (1988).

However, it is obvious that extremely sensitive and private information may occasionally be contained in initial offense reports and initial arrest records -- for example, in the case of sexual crimes, where disclosure can have devastating familial consequences--and may compound what is already a deeply traumatic experience for the victim. Moreover, revealing the identity of such victims in the initial stages of an investigation does not advance any of the policy underpinnings of the right to know. 42 Op. Att'y Gen. 119 (1988).

Acknowledging and protecting the sensitive privacy concerns discussed above serve the public's interest in efficient law enforcement, because they promote prompt reporting of criminal activity. Routine public disclosure of the child victims of incest, for example, would have an obvious chilling effect on the reporting of this widespread and insidious crime. Furthermore, witnesses to crime, who are often placed at risk by their very status as witnesses, are understandably reluctant to cooperate with criminal justice agencies without some assurance that their identity will be kept confidential to the greatest extent possible. 42 Op. Att'y Gen. 119 (1988).

C. Whether denial of public access is required to protect the individual's privacy right. Missoulian v. Board of Regents, 207 Mont. 513, 675 P.2d 962 (1984)

Discussion: Because the judiciary has the authority over the interpretation of the Constitution, it is the Supreme Court's duty to balance the competing rights at issue in order to determine what, if any, information should be disseminated. Allstate Ins. Co., 239 Mont. at 326, 780 P.2d at 189.

The Supreme Court has held that the district court should conduct an *in camera* inspection of the documents or information sought. Only then can the Court properly balance the rights of the respectively parties and protect both rights to the greatest extent possible. " A review of such documents is . . . essential in determining whether or not the privacy interests . . . can be protected while disseminating the remainder of the information." Bozeman Daily Chronicle, 260 Mont. at 222, 859 P.2d at 437.

CONCLUSION

To summarize, initial offense reports and initial arrest records must be made publicly available as a general rule. Occasions may arise, however, when these documents involve a privacy interest that clearly exceeds the public's right to know. This is particularly true in those instances where protecting a meritorious privacy right also advances the general goals of criminal justice agencies in gathering information about and successfully prosecuting crime.

It is impossible to provide a hard and fast rule for balancing these competing rights that would be applicable to all the multifarious situations that give rise to initial offense reports and initial arrest records. Ultimately, the particular custodian of the criminal justice information sought must make the determination concerning whether public disclosure is merited on a case-by-case basis, guided by the principles discussed in this opinion.